



1 remanded for further proceedings in accordance with law and with this Memorandum  
2 Opinion and Order.

### 3 BACKGROUND

4 Plaintiff was born on July 31, 1946, and was 57 years old on his alleged disability  
5 onset date of February 29, 2004. (AR 75.) Plaintiff filed an application for Disability  
6 Insurance Benefits on January 19, 2007 (AR 75-79), and claims he is disabled due to a right  
7 knee injury. (AR 88-89.) Plaintiff has not engaged in substantial gainful activity since his  
8 alleged disability onset date. (AR 13, 89.)

9 Plaintiff's claim was denied initially on June 1, 2007 (AR 48-51), and on  
10 reconsideration on August 24, 2007. (AR 54-58.) Plaintiff filed a timely request for hearing  
11 on August 27, 2007. (AR 59.) Plaintiff appeared without counsel and testified at a hearing  
12 held on May 15, 2008, before Administrative Law Judge ("ALJ") Robert A. Evans. (AR 22-  
13 42.) The ALJ issued a decision denying benefits on June 12, 2008. (AR 11-19.) Plaintiff  
14 filed a timely request for review of the ALJ's decision. (AR 4.) On January 22, 2010, the  
15 Appeals council denied review. (AR 1-3.) Plaintiff then commenced the present action.

### 16 DISPUTED ISSUES

17 As reflected in the Joint Stipulation, there are four disputed issues:

- 18 1. Whether the ALJ properly considered the opinion of a treating physician;
- 19 2. Whether the ALJ properly assessed Plaintiff's residual functional  
20 capacity;
- 21 3. Whether the ALJ properly determined that Plaintiff's right knee impairment  
22 did not meet or equal a listed impairment; and
- 23 4. Whether the ALJ posed a complete hypothetical to the vocational expert.  
24 (JS at 3-4.)

### 25 STANDARD OF REVIEW

26 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether  
27 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.  
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1 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846  
 2 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and  
 3 based on the proper legal standards).

4 Substantial evidence means "'more than a mere scintilla,' but less than a  
 5 preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson  
 6 v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is "such relevant evidence as a  
 7 reasonable mind might accept as adequate to support a conclusion." Richardson, 402 U.S.  
 8 at 401 (internal quotation marks and citation omitted).

9 This Court must review the record as a whole and consider adverse as well as  
 10 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).  
 11 Where evidence is susceptible to more than one rational interpretation, the ALJ's decision  
 12 must be upheld. Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.  
 13 1999). "However, a reviewing court must consider the entire record as a whole and may not  
 14 affirm simply by isolating a 'specific quantum of supporting evidence.'" Robbins, 466 F.3d at  
 15 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue,  
 16 495 F.3d 625, 630 (9th Cir. 2007).

## 17 THE SEQUENTIAL EVALUATION

18 The Social Security Act defines disability as the "inability to engage in any substantial  
 19 gainful activity by reason of any medically determinable physical or mental impairment which  
 20 can be expected to result in death or . . . can be expected to last for a continuous period of  
 21 not less than 12 months." 42 U.S.C. §§ 423(d) (1)(A), 1382c(a)(3)(A). The Commissioner  
 22 has established a five-step sequential process to determine whether a claimant is disabled.  
 23 20 C.F.R. §§ 404.1520, 416.920.

24 The first step is to determine whether the claimant is presently engaging in substantial  
 25 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is  
 26 engaging in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert,  
 27 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant has a  
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1 severe impairment or combination of impairments. Parra, 481 F.3d at 746. An impairment is  
2 not severe if it does not significantly limit the claimant's ability to work. Smolen, 80 F.3d at  
3 1290. Third, the ALJ must determine whether the impairment is listed, or equivalent to an  
4 impairment listed, in Appendix I of the regulations. Id. If the impediment meets or equals  
5 one of the listed impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482  
6 U.S. at 141. Fourth, the ALJ must determine whether the impairment prevents the claimant  
7 from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).  
8 Before making the step four determination, the ALJ first must determine the claimant's  
9 residual functional capacity ("RFC").<sup>1</sup> 20 C.F.R. § 416.920(e). The RFC must account for all  
10 of the claimant's impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),  
11 416.945(a)(2); Social Security Ruling ("SSR") 96-8p. If the claimant cannot perform his or  
12 her past relevant work or has no past relevant work, the ALJ proceeds to the fifth step and  
13 must determine whether the impairment prevents the claimant from performing any other  
14 substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

15 The claimant bears the burden of proving steps one through four, consistent with the  
16 general rule that at all times the burden is on the claimant to establish his or her entitlement  
17 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the  
18 claimant, the burden shifts to the Commissioner to show that the claimant may perform other  
19 gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a  
20 finding that a claimant is not disabled at step five, the Commissioner must provide evidence  
21 demonstrating that other work exists in significant numbers in the national economy that the  
22 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R. §  
23 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and  
24 entitled to benefits. Id.

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26 <sup>1</sup>Residual functional capacity ("RFC") is what one "can still do despite [his or her]  
27 limitations" and represents an assessment "based on all the relevant evidence." 20 C.F.R.  
28 §§ 404.1545(a)(1), 416.945(a)(1).

## DISCUSSION

### A. The ALJ's Decision

In this case, the ALJ determined at step one that Plaintiff has not engaged in substantial gainful activity since February 29, 2004, his alleged disability onset date. (AR 13.)

At step two, the ALJ determined that Plaintiff suffers from the following severe impairment: right knee injury with medial meniscus tear and a partial or full thickness tear of the anterior cruciate ligament. (AR 13.)

At step three, the ALJ found that Plaintiff does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments. (AR 13.)

The ALJ found that Plaintiff has the RFC to "lift and carry 50 pounds occasionally and 25 pounds frequently, stand/walk 6 hours in an 8-hour workday, sit 6 hours in an 8-hour workday[,] and occasional kneeling." (AR 13-17.)

At step four, the ALJ determined that Plaintiff could not perform his past relevant work as a baker or dough mixer. (AR 18.)

At step five, the ALJ relied on the testimony of a vocational expert in determining that there are jobs that exist in significant numbers in the national economy that Plaintiff can perform, specifically cleaner and packager. (AR 18-19.) The ALJ therefore concluded that Plaintiff is not disabled. (AR 19.)

### B. The ALJ Did Not Properly Evaluate the Treating Physician's Opinion.

Plaintiff contends that the ALJ did not properly evaluate the opinion of a treating physician, Dr. Mark Greenspan. (JS at 3-5, 8.) The Court agrees.

#### 1. Relevant Law

In evaluating medical opinions, the case law and regulations distinguish among the opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant (non-examining, or consulting, physicians). See

20 C.F.R. §§ 404.1527, 416.927; see also Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). In general, an ALJ must accord special weight to a treating physician's opinion because a treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citation omitted). If a treating source's opinion on the issues of the nature and severity of a claimant's impairments is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is not inconsistent with other substantial evidence in the case record, the ALJ must give it "controlling weight." 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

Where a treating doctor's opinion is not contradicted by another doctor, it may be rejected only for "clear and convincing" reasons. Lester, 81 F.3d at 830. However, if the treating physician's opinion is contradicted by another doctor, such as an examining physician, the ALJ may reject the treating physician's opinion by providing specific, legitimate reasons, supported by substantial evidence in the record. Lester, 81 F.3d at 830-31; see also Orn, 495 F.3d at 632; Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002). Where a treating physician's opinion is contradicted by an examining professional's opinion, the Commissioner may resolve the conflict by relying on the examining physician's opinion if the examining physician's opinion is supported by different, independent clinical findings. See Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995); Orn, 495 F.3d at 632. However, "[t]he opinion of a non-examining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician"; such an opinion may serve as substantial evidence only when it is consistent with and supported by other independent evidence in the record. Lester, 81 F.3d at 830-31; Morgan, 169 F.3d at 600.

## **2. Analysis**

Dr. Greenspan was Plaintiff's Worker's Compensation secondary treating physician. (AR 14, 149.) He treated Plaintiff from August 2004 through September 2005. (AR 152.) In his permanent and stationary report dated September 13, 2005, Dr. Greenspan opined,

1 among other things, that Plaintiff “is precluded from the performance of climbing, walking  
2 over uneven ground, squatting, kneeling, crouching, crawling, and pivoting, or other activities  
3 involving comparable physical effort.” (AR 156.) As the ALJ noted, Dr. Greenspan’s opinion  
4 of these limitations was contradicted by the consultative examining orthopedist, who believed  
5 that Plaintiff’s only postural limitation was the capacity to tolerate only occasional kneeling.  
6 (AR 15, 236.) The ALJ was therefore required to provide specific and legitimate reasons to  
7 reject Dr. Greenspan’s opinion. The ALJ failed to do so.

8         The only reason the ALJ provided for rejecting the limitations assessed by Dr.  
9 Greenspan is that they were allegedly “not supported by the objective findings relative to the  
10 right knee from the clinical examinations.” (AR 16.) The ALJ provided no further explanation  
11 of his rationale, and he did not mention any of Dr. Greenspan’s objective findings. Dr.  
12 Greenspan’s diagnostic impression was that Plaintiff’s right knee had a bucket-handle tear of  
13 the medial meniscus, osteonecrosis of the medial tibial plateau, and a strain or partial tear of  
14 the anterior cruciate ligament. (AR 155.) As objective findings or factors of disability, Dr.  
15 Greenspan noted: March 2004 MRI findings that supported his diagnoses; “tenderness of  
16 the medial joint line and lateral joint line of the right knee;” “a 25-degree loss of flexion of the  
17 right knee;” “a varus appearance to both knees;” increased pain in the right knee upon toe  
18 walking, heel walking and squatting; inability to duck walk due to “limiting pain in the right  
19 knee;” and patellofemoral crepitation in the right knee. (AR 156.) The ALJ did not account  
20 for these findings when he stated that “the objective findings relative to the right knee from  
21 the clinical examinations” do not support Dr. Greenspan’s assessed limitations. (AR 16.)  
22 Because Dr. Greenspan’s objective findings appear to substantiate his assessed limitations,  
23 the Court finds that the ALJ did not provide a legitimate reason for rejecting Dr. Greenspan’s  
24 opinion.

25         The Court cannot conclude that the ALJ’s error in rejecting Dr. Greenspan’s opinion  
26 was harmless. There is no evidence in the record that Plaintiff could perform jobs that exist  
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1 in significant numbers in the national economy if the limitations noted by Dr. Greenspan are  
2 credited. Remand is warranted for the ALJ to reevaluate Dr. Greenspan's opinion.<sup>2</sup>

3 **ORDER**

4 IT IS HEREBY ORDERED that Judgment be entered reversing the decision of the  
5 Commissioner of Social Security and remanding for further proceedings in accordance with  
6 law and with this Memorandum Opinion and Order.

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

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9 DATED: February 22, 2011

/s/ John E. McDermott  
JOHN E. MCDERMOTT  
UNITED STATES MAGISTRATE JUDGE

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24 <sup>2</sup>In light of the Court's remand order, the Court need not adjudicate Plaintiff's other  
25 challenges to the ALJ's decision. The Court notes, however, that Plaintiff's arguments that  
26 the ALJ improperly assessed Plaintiff's RFC and did not pose a complete hypothetical to the  
27 vocational expert are derivative of his argument that the ALJ erred in rejecting Dr.  
28 Greenspan's opinion. (JS at 8-9, 11, 16-18.) The ALJ's reevaluation of Dr. Greenspan's  
opinion will impact his determination of Plaintiff's RFC and his hypothetical to the vocational  
expert. In addition, the ALJ is free to reconsider whether Plaintiff's impairment meets or  
medically equals a listed impairment.